

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF FORFEITURE OF WATER)
RIGHTS UNDER PERMIT 17792, CERTIFICATE)
5765, APPROPRIATED FROM AN UNDERGROUND)
SOURCE, PAHRUMP VALLEY ARTESIAN GROUND-)
WATER BASIN (162), NYE COUNTY, NEVADA.)

RULING

4374-A

GENERAL

I.

Application 17792 was filed by Alvin L. Bells on January 20, 1959, to appropriate the underground waters of the Pahrump Valley Artesian Groundwater Basin for irrigation and domestic purposes on 128 acres within the W $\frac{1}{2}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 36, T.19 S. R.52 E., M.D.B.&M. The point of diversion is described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 36. A permit was issued on Application 17792 on June 1, 1959, for 2.23 cubic feet per second (cfs) of water.¹ After Proof of Beneficial Use of the waters as allowed under the permit was filed in the Office of the State Engineer, on October 6, 1964, the State Engineer issued Certificate 5765 allowing for the diversion of 2.23 cfs of water, not to exceed of total duty of 640.0 acre-feet annually (afa), for the irrigation of 48.0 acres of land within the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 40.0 acres within the NW $\frac{1}{4}$ SE $\frac{1}{4}$, and 40.0 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 36, for a total of 128 acres.

II.

The State Engineer initially described and designated a portion of the Pahrump Valley Artesian Groundwater Basin on March 11, 1941.² The State Engineer subsequently extended the boundaries of the designated area of the Pahrump Valley Artesian Groundwater Basin on January 15, 1948,³ and on January 23, 1953.⁴

¹ File No. 17792, official records in the Office of the State Engineer.

² State Engineer's Order No. 176, dated March 11, 1941, official records in the Office of the State Engineer.

³ State Engineer's Order No. 193, dated January 15, 1948, official records in the Office of the State Engineer.

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On October 26, 1987, the State Engineer issued Order 955 wherein he found that the groundwater levels in the Pahrump Valley were declining and ordered that all applications filed to appropriate water from the Pahrump Valley Artesian Groundwater Basin in the east side of the basin on the Pahrump and Manse Fans would be denied; all applications for all uses except small commercial uses on the valley floor would be denied; and all applications filed to appropriate water for irrigation purposes on lands in Pahrump Valley that have had a certificated water right forfeited where the forfeiture occurred prior to January 1, 1988, would be considered for approval on an individual basis; however, such applications would only be considered if they had been filed within 60 days of the date the water right had been declared forfeited.

III.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held on June 5, 1990, at Pahrump, Nevada, before representatives of the Office of the State Engineer with regard to the forfeiture of that portion of Permit 17792, Certificate 5765, appurtenant to the 40.0 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 36.⁵

FINDINGS OF FACT

I.

The State Engineer finds that in order for a water right permit to ripen into a water right certificate the permittee must file proof of the application of the water to beneficial use within the time frame set forth in the permit or in any extension of time granted by the State Engineer.⁶ After a certificate is issued on a permit, failure for five successive years on the part of the

⁴State Engineer's Order No. 205, dated January 23, 1953, official records in the Office of the State Engineer.

⁵Transcript, public administrative hearing before the State Engineer, June 5, 1990.

⁶NRS 533.410.

certificate holder to use beneficially all, or any part of the underground water of the State of Nevada for the purpose for which the right is acquired or claimed, works a forfeiture of the right to the use of that water to the extent of the nonuse.⁷

II.

Testimony and evidence presented at the administrative hearing showed that each year from 1982 through 1989 employees of the Office of the State Engineer physically visited the Pahrump Valley Artesian Groundwater Basin and conducted what are known as ground water pumpage inventories which documented the use of water for irrigation purposes as allowed under Certificate 5765.⁸ For the years 1982 through 1989, 1985 excluded, the pumpage inventories indicated no water had been used for irrigation within that portion of the certificate's place of use identified as the 40 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 36, T.19 S., R.52 E., M.D.B.&M. The pumpage inventory contained no entry for 1985; however, based on the fact that no water was used in all the other years, the State Engineer finds it persuasive that no water was used in 1985.

However, the State Engineer also finds that the permittee supplied evidence to refute the evidence of no use of the water and to show some water was put to beneficial use for irrigation purposes as allowed under Certificate 5765 during the period considered for forfeiture. The evidence was in the form of unnotarized statements,⁹ an aerial photograph of the place of use¹⁰, and testimony from the permit holder that he has grown crops in a 13 acre area on the west side of the 40 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 36, T.19 S., R.52 E.¹¹

⁷NRS 534.090.

⁸Exhibit No. 2.

⁹Exhibit No. 12.

¹⁰Exhibit No. 13.

¹¹Note area drawn in red on Exhibit 13.

The State Engineer finds that the aerial photo does not clearly show any evidence of recent irrigation, and that the statements filed by friends and those who board horses are not in the form of sworn affidavits with authenticated signatures. The State Engineer finds that the holder of the water right did not present any evidence of use of the water as allowed under the certificate, except for the 13 acre area. The staff of the Office of the State Engineer appeared to agree that a small portion of the 40 acre parcel had been irrigated.¹²

The State Engineer finds that from the on-site inspection each year, as documented in the pumpage inventory of the groundwater basin, and from the testimony and evidence that no irrigation took place within that portion of the certificate's place of use identified as the 40 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 36, T.19 S., R.52 E., M.D.B.&M, for each of the years from 1982 through 1989, excepting out the 13 acres on the west side of the parcel.

III.

Mr. Bells also provided evidence of Minutes from a Town of Pahrump Town Board meeting of October 30, 1989, wherein a reference is made that Mr. Bells donated 25 acre feet of water rights to the county.¹³ The State Engineer finds that nothing in the records of the State Engineer indicates any assignment of the ownership of a 25 acre-foot portion of the water rights under Certificate 5765 has ever been filed in the Office of the State Engineer, nor has any application to change the point of diversion, place or manner of use ever been filed to move the water to the fire station or a park.¹⁴

¹²Transcript, p. 19.

¹³Exhibit No. 14.

¹⁴Transcript, pp. 20-22.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹⁵

II.

Forfeiture must be demonstrated by clear and convincing evidence. Clear and convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.¹⁶ To establish a fact by clear and convincing evidence a party must persuade the trier of fact that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true.¹⁷

The State Engineer concludes clear and convincing evidence showing non-use of a portion of the water right as allowed under Certificate 5765, Permit 17792, for five successive years is found in the testimony and evidence regarding the pumpage inventories, visits to Pahrump Valley Artesian Groundwater Basin, and testimony of the water right holder, resulting in the forfeiture of a 155 acre-foot portion of the 200 acre-foot of water rights held under Certificate 5765, Permit 17792, that are appurtenant to the 40 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 36.

RULING

The right to beneficially use a 135 acre-foot portion of the water appurtenant to the 40 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36, T.19S., R.52E., excepting out 13 acres on the west side of the parcel under Permit 17792, Certificate 5765, is hereby declared forfeited based on the failure for a period of five successive years on the part of the holder of the right to beneficially use the water for the purposes for which the subject water right was

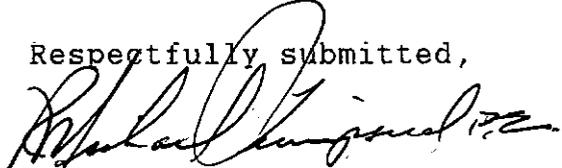
¹⁵NRS Chapters 533 and 534.

¹⁶1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

¹⁷Id. at 239.

acquired. Sixty-five (65) acre-feet of the water rights under Permit 17792, Certificate 5765, appurtenant to 13 acres on the west side of the 40 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 36 was in good standing as of the hearing held on June 5, 1990. This ruling does not make a statement as to the status of the remaining 65 acre-feet since June 5, 1990, nor were the water rights appurtenant to the 48 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the 40 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ a subject of consideration in this hearing or ruling.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 26th day of
July, 1996.